



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 1, 2003

Mr. Matthew C. G. Boyle
Assistant City Attorney
Boyle & Lowry, L.L.P.
4201 Wingren, Suite 108
Irving, Texas 75062-2763

OR2003-2651

Dear Mr. Boyle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179701.

The City of Farmers Branch (the "City") received a request for release of the top three bid proposals for the City's Employee Assistance Program (with the exception of the requestor's proposal), a listing of all bidders, the prices submitted, and evaluation criteria scores. You state that you have released some of the responsive information. However, you indicate that the release of other portions of the request may implicate a third party's proprietary interest. You claim that the remaining requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code, and have notified an interested third party, FEI Behavioral Health ("FEI"), pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the City's obligations pursuant to section 552.301 of the Government Code. Under section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general

written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

You did not submit to this office written comments stating the reasons why the exception that you raised would allow the information to be withheld. In addition, you did not submit the information at issue within the 15-day statutory period. The City received the request for information on February 5, 2003. We received the responsive information on March 25, 2003. Therefore, we find you did not submit the requested information within the prescribed period. Consequently, we conclude the City failed to comply with the requirements of section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, when some other source of law makes the information confidential or the information impacts the interests of a third party, a compelling interest exists. Open Records Decision No. 150 at 2 (1977). You assert sections 552.104 and 552.110 of the Government Code. Section 552.104, a discretionary exception under the Public Information Act (the "PIA"), does not constitute a compelling reason sufficient to overcome the presumption of openness. *See* Open Records Decision Nos. 592 (1991) (governmental body may waive section 552.104), 522 (1989) (discretionary exceptions in general). However, as section 552.110 impacts a third party's interest, section 552.110 is a compelling reason to overcome the presumption of openness.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

Furthermore, as of the date of this letter, FEI has not submitted to this office its reasons explaining why the requested information should not be released. Consequently, FEI has not provided this office with a basis to conclude that its responsive information is excepted from disclosure. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not

conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Accordingly, you must release the requested information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

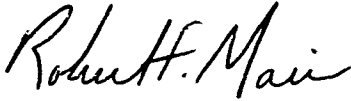
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, reading "Robert F. Maier". The signature is written in a cursive style with a large, stylized "M".

Robert F. Maier
Assistant Attorney General
Open Records Division

RFM/lmt

Ref: ID# 179701

Enc. Submitted documents

c: Mr. Rick Dielman
WAP
2525 Wallingwood Drive, Bldg. 5
Austin, Texas 78746
(w/o enclosures)